A Few Pieces Short of a Jigsaw: Appealing Inadequately Reasoned Judgments

Posted On: 09/12/2021
Authors: Sarah Hopkinson, Kate Longson

It is not uncommon for a losing party to be disgruntled by the outcome of his/her case. However, the majority of the time, the findings of fact which have brought a judge to their conclusion will be unimpeachable and the reasons given, whilst potentially contrary to the beliefs of the losing party, will be sufficiently clear as to allow that party to understand why he/she has lost. There will, however, be occasions when this is not the case, potentially leaving the decision open to challenge.

Background

The duty to give reasons is well established and clearly articulated by the Court of Appeal in the case of *Flannery v Halifax Estate Agencies Ltd t/a Colleys Professional Services* [2000] 1 WLR 377 at pp. 381G-382C:

"*(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in* Ex p. Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*

"*(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.*

"*(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.*

"*(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and*

that will differ from case to case. Transparency should be the watchword."

The decision in *Flannery* led to a deluge of attempted appeals on this point and the appellate courts quickly had to focus on the limits of the requirement to give reasons and the level of clarity required. Such guidance was provided in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [2]:

"Flannery's *case has inspired a large number of applications for permission to appeal on the ground of inadequate reasons. In granting permission to appeal in one of the appeals before us, Sedley LJ remarked that they were becoming a cottage industry. It is an industry which is an unwelcome feature of English justice. The rights of appeal that are afforded under statute reflect the fact that no judge is infallible. It should, however, be possible to deduce from a judgment the reason for the judge's decision. Happily the rash of applications for permission to appeal based upon the decision in* Flannery's *case does not reflect a widespread inability or disinclination on the part of the judiciary to explain the basis for their decisions. Rather it reflects uncertainty on the part of litigants and judges alike as the extent to which a judgment should detail the chain of reasoning which has led to the order made by the judge.*"

In elaborating upon the necessity to give reasons as articulated in *Flannery*, Phillips LJ commented at [19]:

"*It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.*"

The Need for Clarification

Appeals are costly, time consuming and, at best for the appellant, a successful appeal in this context will only lead to a rehearing. It stands to reason, therefore, that a prospective appellant ought to take steps to try to clarify an unclear judgment prior to appealing it.

The Court of Appeal gave some guidance as to what is to be expected of appellants and judges where a decision is said to be poorly or inadequately reasoned in *English* at [24]-[25]:

"*We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs.*

"*Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.*"

In *Re A (children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595, Munby LJ set out the process by which a failure to give adequate reasons should be challenged in civil and family cases alike at [16]-[18]:

"*First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.*

"*Second, and whether or not the advocates have raised the point with the judge, where permission is sought from the trial judge to appeal on the ground of lack of reasons, the judge should consider whether his judgment is defective for lack of reasons and, if he concludes that it is, he should set out to remedy the defect by the provision of additional reasons.*

"*If, nonetheless, as in the present case, neither of these things happens, what is this court to do? It can, of course, proceed, as in Re A, to decide the application for permission to appeal, or the appeal itself, on the basis of the judgment as it stands. But in an appropriate case – and for this purpose it makes no difference whether the court is considering an appeal or only an application for permission to appeal – this court can, either on it (sic) own initiative or on the application of the parties, remit the case to the trial judge (if need be adjourning the hearing in the meantime) with an invitation to him to provide, as the case may be, additional reasons for his decision or clarification of an ambiguity.*"

That the appellate court is prepared to adopt a robust approach if those steps are not followed is made clear by the decision of Birss J in *Drury v Rafique* [2018] EWHC 1527 (Ch) at [16]:

"*Despite the fact that a failure to give adequate reasons was put at the forefront of the appellant's case relating to damages, no attempt was made to invite the judge to consider whether to amplify his reasons before complaining about their inadequacy on appeal. Counsel for the respondents submitted this was contrary to the guidance given by Wilson LJ in* Paulin v Paulin *[2010] 1 WLR 1057 at paragraph 30(a). Counsel for the appellant's response as I understood it was that there would have been no point in doing so given that his client had lost. That is wrong. It seems to be on the assumption that the reasons would have rejected the appellant's case on the topics he says were not covered. That is no excuse but even if it is what would have happened, the approach the appellant has therefore taken runs a real risk of unnecessarily prolonging the proceedings. If the appeal court rejects the submission that the reasons are inadequate then that is one thing, but if the reasons are lacking then it does not follow that the right thing to do is conduct a rehearing on appeal without the benefit of hearing the witnesses. The right thing to do might be to direct a retrial, which would have been entirely unnecessary if the judge had had the opportunity to amplify his reasons.*"

Considerations for the Appellate Court

Context is key. The appellate court must consider the judgment in light of the evidence and submissions heard at first instance. This will be a particularly important consideration in appeals from fast track trials and small claims, since the court will have heard the evidence and submissions in the hours, and sometimes minutes, before giving judgment. In those circumstances, the parties will often be able to contextualise the judgment much more easily.

Further guidance as to the clarity required of a judgment has recently been provided by the Court of Appeal in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 per Males LJ at [46]-[47]:

"*Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.*

"*I would not go so far as to say that a judgment which fails to follow these requirements will necessarily be inadequately reasoned, but if these requirements are not followed the reasoning of the judgment will need to be particularly cogent if it is to satisfy the demands of justice. Otherwise there will be a risk that an appellate court will conclude that the judge has "plainly failed to take the evidence into account*".

Where Clarification is Insufficient

Only in extreme cases will appellate courts be persuaded that deficiencies in a judgment cannot be cured by clarification from the trial judge, such that the only option is to remit the matter for a rehearing.

One such extreme example is the recent case of *Re O (A Child) (Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149 in which the Court of Appeal set out the plethora of errors and omissions in the first instance judgment at [44]-[52], which included:

- insufficient reasoning;
- a failure to take account of some material factors;
- a failure to address certain aspects of the evidence; and
- a failure to take account of various aspects of the evidence in the context of the totality of the evidence before reaching a conclusion.

The Court of Appeal concluded that, taken together, the above deficiencies incurably undermined the reliability of the judge's factual conclusions. Per Baker LJ at [63]:

"*This is not a case where a few pieces of the jigsaw are missing. Accordingly, this is not in my view a case where the judge should be invited to expand on the reasons for his decision. I regret to say that the only fair course is to remit the matter for re-hearing*."

Comment

If an appeal is contemplated on the grounds of inadequacy of judicial reasoning, the trial judge should be asked to clarify their reasons. If this is not done at the conclusion of trial, it still ought to be done when appeal is being considered in all but the most extreme of cases. Per Baker LJ in *Re O* at [61]:

"*... where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal.*"

Having sought clarification, careful consideration then needs to be given as to whether the judgment is sufficiently unclear to be vulnerable to an appeal, having regard to the guidance in *Simetra*.

The reality is that the circumstances which might give rise to an appeal on the grounds of inadequate reasons are likely to be relatively rare. Even when they arise, the case law suggests that a successful appellant will only ever achieve a retrial. Thus, the time and costs which will be expended should be carefully considered when deciding whether to appeal the judgment, particularly in small claims/fixed costs cases where costs recovery is limited.

It is also imperative that the appealing party gives due consideration to the merits of the underlying action, so as to avoid a successful appeal being reduced to a pyrrhic victory should the appellant ultimately lose at retrial for better (and/or different) reasons.